No. 90-1803

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

PAUL A. BILZERIAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court violated petitioner's attorney-client privilege when it indicated, in response to petitioner's requests for anticipatory evidentiary rulings, that if petitioner testified that he acted in good faith in making false statements in SEC filings he would be subject to cross-examination regarding pertinent communications with his attorneys.

2. Whether materiality is an element of all offenses defined by the false statement statute, 18 U.S.C. 1001.

3. Whether false statements in informational reports filed with the SEC are subject to prosecution under the general false statement statute, 18 U.S.C. 1001.

4. Whether the conspiracy count of the indictment was defective in charging petitioner with a conspiracy both to commit specified offenses and to defraud the United States.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-36a) is reported at 926 F.2d 1285. The opinion of the district court denying petitioner's motion for a new trial (Pet. App. 37a-50a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 3, 1991. A petition for rehearing was denied on February 22, 1991 (Pet. App. 51a). The petition for a writ of certiorari was filed on May 22, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on two counts of securities fraud, in violation of 15 U.S.C. 78j(b) and 78ff; five counts of concealing material facts and making false statements on matters within the jurisdiction of the Securities and Exchange Commission, in violation of 18 U.S.C. 1001; and two counts of conspiracy to commit various specified offenses and to defraud agencies of the United States, in violation of 18 U.S.C. 371. Petitioner was sentenced to four years' imprisonment and was fined a total of $1,500,000.[1]

1. The evidence at trial established that petitioner engaged in a series of fraudulent transactions in securities issued by four companies. To further and conceal his schemes, petitioner submitted false reports to the SEC, filed a false tax return with the IRS, and exchanged false invoices with his broker.

a. In 1985, petitioner acquired control over 24 percent of the shares of Cluett, Peabody & Co., Inc., and made a tender offer for the remaining shares. In December, he sold his position, realizing a reported trading profit of approximately $7 million. In connection with his dealings in Cluett shares, petitioner engaged in several fraudulent schemes. Gov't C.A. Br. 4.

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[1] The court imposed concurrent four-year terms of imprisonment on both securities fraud counts, both conspiracy counts, and two of the false statement counts, and it fined petitioner $250,000 on each of those counts. We do not agree with petitioner's assertion that a ruling in his favor on the first question presented would require reversal of all of his convictions. See Pet. 6-7 n.3; Gov't C.A. Br. 26-27.

In April and May 1985, petitioner raised $9 million from Edward J. DeBartolo, Sr., and other individual investors to purchase Cluett shares. The funds were provided by means of trusts; petitioner promised that the investors would receive half the profits from the sale of the shares and guaranteed them against loss. Petitioner used those funds to purchase 581,000 shares on margin for approximately $30 per share. Pet. App. 3a; Gov't C.A. Br. 4-5.

By mid-May 1985, petitioner had control over 4.3 percent of Cluett's stock. Under SEC regulations, any investor who acquires beneficial ownership of 5 percent or more of a publicly traded company must make a Schedule 13D filing that discloses, among other things, the source of the funds and agreements of the sort petitioner had made with the investors. See 17 C.F.R. 240.13d-1 *et seq.*; Pet. App. 20a-21a. To avoid disclosure of his purchases, which might have driven up the price of the stock, petitioner arranged to have a broker, Jefferies & Company, Inc., "accumulate" shares for him.[2] Acting as petitioner's nominee, Jefferies accumulated 302,000 shares in one of its accounts, receiving approval from petitioner for each purchase. Petitioner then "purchased" the shares from Jefferies at its cost, plus interest and commissions. Pet. App. 4a; Gov't C.A. Br. 6-7.

Petitioner capitalized on the accumulation arrangement to delay the Schedule 13D filing. The filing that petitioner ultimately made was false and mis-

[2] Under an "accumulation" agreement, the broker purchases shares for its account, but the party in interest (here, petitioner) agrees to purchase them for the broker's cost, plus interest and commissions. Although the shares are in the broker's name, the broker is protected from market risk and acts essentially as a nominee.

leading in two respects: It represented that the Cluett shares had been purchased with "personal funds" rather than funds supplied by investors, and it misstated the date when petitioner's holding reached 5 percent, thereby concealing the accumulation agreement. Pet. App. 3a-4a; Gov't C.A. Br. 5-7.

In October 1985, petitioner made a $40 per share cash tender offer, which he hoped would induce a "white knight"—a competing offeror supported by the company's management—to purchase his shares for a premium. The offering statement represented that petitioner had purchased 347,567 Cluett shares "in an open market transaction" at $38 per share. In truth, the purchase was actually a privately negotiated transaction between petitioner and a group of wealthy investors headed by DeBartolo; petitioner had not paid for the shares, because the transaction was not subject to settlement for 45 days; the transaction was subject to cancellation if another party offered a price in excess of petitioner's tender offer; the price was $40 per share, not $38 (a discrepancy petitioner sought to conceal with false documentation); and 66,667 of the shares included in this block were already under petitioner's control. Pet. App. 4a; Gov't C.A. Br. 7-8.

In December 1985, petitioner sold the 581,000 shares he had purchased for $40 per share and divided the profit of $10 per share with the investors who had supplied the funds. In connection with his role in the Cluett transactions, petitioner was charged with one securities fraud count and three false statement counts; the Cluett schemes were also the subject (along with other matters) of one conspiracy count. Pet. App. 4a.

b. From June to September 1986, petitioner acquired control of 20 percent of the common stock of

Hammermill Paper Company, which he sold for a reported trading profit of $58 million. As in the case of Cluett, petitioner concealed the source of his funds and engaged Jefferies to accumulate stock as his nominee in order to conceal his activity. Gov't C.A. Br. 9.

In June 1986, petitioner used $8 million supplied by DeBartolo pursuant to a profit-sharing agreement and a trust, and other funds, to purchase 803,275 shares on margin. When his holdings reached 4.9 percent of Hammermill's shares, petitioner arranged for Jefferies to accumulate additional shares as his nominee, in order to delay filing the SEC report disclosing his holding of more than 5 percent of Hammermill's shares. After his position (including the shares accumulated by Jefferies) had passed the 5 percent mark, petitioner continued to purchase shares from unknowing investors. Petitioner "purchased" the accumulated shares from Jefferies on July 21, 1986. Because the market price on that day was higher than the price due Jefferies (its cost plus interest and commissions), petitioner instructed Jefferies to execute the trade after the New York Stock Exchange closed for the day. Although he was required to disclose his position no later than July 7, petitioner did not file the required SEC report until July 25. The report falsely represented that petitioner had used "personal funds" to purchase Hammermill shares and that petitioner attained his 5 percent position only when he acquired the accumulated shares from Jefferies. Pet. App. 5a; Gov't C.A. Br. 9-11.

Petitioner sold his 803,275 Hammermill shares to a "white knight" in September 1986, realizing a profit of approximately $23 per share. Petitioner

shared the profit with DeBartolo. The Hammermill transactions were the subject of one securities fraud count, two false statement counts, and (together with the Cluett transactions) a conspiracy count. Pet. App. 5a; Gov't C.A. Br. 10.

c. In 1985, petitioner arranged to "park" 58,000 shares of H.H. Robertson Co. stock with Jefferies for 31 days, in order to claim a tax loss while retaining control over the stock.[3] Although petitioner assured Jefferies he would repurchase the stock, the stock price fell substantially in the interim and petitioner refused to honor his commitment. As a result, Jefferies incurred a $250,000 loss. To resolve the resulting dispute, the individual who had referred petitioner to Jefferies, John LeFrere, agreed to generate $250,000 in commissions for Jefferies. By December 1985, LeFrere had generated approximately $125,000 in commissions. Jefferies insisted that petitioner make up the difference by the end of the year. Petitioner agreed to pay Jefferies $125,000 on the condition that the payment would be refunded as LeFrere generated additional commissions in 1986. To conceal the true nature of the payment, Jefferies sent petitioner a false invoice for consulting services in the amount of $125,000, which petitioner claimed as an expense on a 1985 partnership tax return. By March 1986, LeFrere had generated an additional $125,000 in commissions. Seeking the return of his payment, petitioner sent Jefferies two false invoices for con-

[3] "Parking" refers to a transaction in which a broker-dealer buys stock from a customer with the understanding that the customer will buy the stock back at a later date for the purchase price plus interest and commissions. As in the case of an accumulation agreement, the broker-dealer assumes no market risk and acts only as the nominal owner of the shares.

sulting services that he had not performed. Pet. App. 5a-6a; Gov't C.A. Br. 11-12.

Petitioner also arranged to "park" 306,000 shares of Armco Steel stock with Jefferies for a 30-day period beginning September 2, 1986. As in the case of the Robertson parking arrangement, petitioner sought to claim a tax loss without actually relinquishing the stock. While his Armco shares were parked with Jefferies, petitioner also arranged to have Jefferies accumulate shares on his behalf. On October 1, 1986, petitioner "purchased" the parked stock and the accumulated stock—a total of 818,900 shares—at the then-market price of $8 per share. Under the formulas prescribed by the parking and accumulation agreements, however, petitioner owed Jefferies only $7.30 per share. To recover the difference, while concealing the scheme, petitioner sent Jefferies a false invoice for consulting services that he had not performed. Pet. App. 6a; Gov't C.A. Br. 13.

In connection with the Robertson and Armco transactions, the indictment charged that petitioner conspired to defraud the SEC and the IRS and to commit violations of the Securities Exchange Act and the false statement statute. Pet. App. 6a.

2. a. At trial, petitioner testified in his own defense. In a motion *in limine*, he sought a ruling that he could testify that he believed in good faith that it was lawful to describe the money supplied by investors for the Cluett and Hammermill transactions as "personal funds" without exposing himself to cross-examination concerning communications with his attorney on that subject. The government's evidence showed that petitioner had consulted with counsel regarding his SEC filings, and petitioner had testified before the SEC in 1988 that he believed his

description was legitimate, based on conversations with counsel as to which he asserted attorney-client privilege. In connection with the motion *in limine*, however, petitioner disavowed an advice-of-counsel defense and asserted that he would not identify the basis for his alleged good faith belief. Tr. 2340-2341. See Pet. App. 39a.

The trial court ruled that if petitioner testified that he acted in good faith with respect to the Cluett and Hammermill transactions, he would be subject to cross-examination regarding the basis for that state of mind, including communications with his attorney. Pet. App. 7a. The court reasoned that "[i]n order to make a fair evaluation of a person's state of mind, you have to know what was in his mind, therefore, it seems to me * * * his testimony may open the door." Tr. 2344. See Tr. 2346, 2348-2349.

As the trial progressed, petitioner sought additional anticipatory rulings on the manner in which the court's privilege determination would apply to particular lines of inquiry.

First, petitioner proposed to testify about steps he took to restructure investor financing in Cluett and Hammermill, in order to suggest to the jury that he believed his descriptions of the transactions were lawful. See Pet. App. 12a-13a. The prosecutor pointed out that on the facts of this case, such testimony would be "just one step removed" from testimony as to state of mind itself. Tr. 2419. The court indicated that if petitioner was asked what he did to restructure the Cluett and Hammermill transactions, it would "open[] the door to * * * cross-examination on why he did it." *Ibid.* The court added, however, that "[w]hat he did is really in the record already[,]

having been put there by [other witnesses]." *Ibid.* Thereafter, petitioner provided some testimony regarding the structure of the Cluett and Hammermill transactions, but he was not cross-examined on any attorney-client communications. See Gov't C.A. Br. 17-18.

Second, before redirect examination, defense counsel sought an assurance from the court that any testimony petitioner might give with respect to prior SEC testimony on which he had been cross-examined would not open the door to recross-examination regarding his communications with counsel. The court responded that it would "not * * * really attempt to supply an advisory decision," Tr. 2906, but noted that if petitioner's explanation of his SEC testimony entailed an assertion of good faith, "what you are doing then on redirect is precisely what you sought to do on direct examination," Tr. 2908. The court concluded (Tr. 2911):

> I am suggesting that you have a perfect right to do anything you want and I will give you ultimate latitude on redirect examination, but once you go beyond a certain point, and I can't measure that point for you now, you may open the door to [recross] examination.
>
> I cannot say any more than that because obviously we can't sit down and structure a redirect examination question by question and then choreograph a recross-examination the same way. It just doesn't work that way.

Third, petitioner then proposed to have petitioner "affirm" unspecified portions of his SEC testimony. Tr. 2914. Again, the trial court cautioned that the introduction of that evidence might justify cross-examination. Tr. 2915 ("I don't want you in pre-

paring your examination to just put down the questions and answers which may include all kinds of explanations without understanding that those explanations may very well give rise to an inquiry on recross-examination."). But the court concluded, "I want you to understand something very, very clearly. I am not making any definitive ruling or commitment on any of this." Tr. 2923. Following a recess, petitioner specified certain passages of his SEC testimony that he proposed to offer under Fed. R. Evid. 106. After an extended colloquy, the district court suggested, as a substitute, that petitioner respond to particular questions in a manner that would not open the door to attorney-client communications. Tr. 2930-2946. The court then reiterated its prior ruling that if petitioner testified that he acted in good faith with respect to the Cluett and Hammermill matters, he would be subject to full cross-examination. Tr. 2946-2949.

After the jury had returned guilty verdicts on all counts, the district court denied petitioner's motion for a new trial. Pet. App. 37a-50a. Explaining the basis for its prior rulings on the attorney-client privilege, the court stated that "if [petitioner] testified on direct examination concerning his state of mind, the Government would be permitted to inquire into the basis of [petitioner's] purported good faith, including any advice he received from counsel on the subject." *Id.* at 39a.

b. The false statement counts in the indictment charged that petitioner's SEC filings violated 18 U.S.C. 1001 in specified respects both by concealing "material facts" and by making false statements in a matter within the jurisdiction of the SEC. C.A. App. C, ¶¶ 24, 26, 28, 46, 48. The court instructed

the jury, in accordance with Second Circuit precedent, that the facts allegedly concealed were material but that it was not necessary for the government to prove materiality in order for the jury to convict petitioner of making a false statement. Pet. 16 n.21.

3. The court of appeals affirmed. Pet. App. 1a-36a. The court upheld the district court's rulings on the attorney-client privilege issue. The court of appeals noted that the privilege "may implicitly be waived when [a] defendant asserts a claim that in fairness requires examination of protected communications." *Id.* at 9a. That principle was applicable here, the court explained, because testimony that petitioner "thought his actions were legal would have put his knowledge of the law and the basis for his understanding of what the law required in issue." *Id.* at 10a. The court of appeals noted that the district court's rulings did not preclude petitioner from arguing that the government failed to carry its burden of proving criminal intent. *Ibid.* Moreover, the court continued, the district court "took great pains to point out that application of the privilege would hinge on the testimony elicited on direct examination," and petitioner sought only "an advisory ruling in advance, assuring that the attorney-client privilege would not be waived regardless of what developed in his direct testimony." *Id.* at 11a. Under these circumstances, the court of appeals held, the district court did not abuse its discretion when it refused to grant petitioner "blanket protection from an implied waiver of the attorney-client privilege." *Id.* at 12a.[4]

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[4] Judge Lumbard concurred in the affirmance of the conviction, substantially for the reasons set forth in the principal opinion. With respect to the attorney-client privilege issue, Judge Lumbard agreed with the other members of the panel

The court affirmed the convictions on the false statement counts by a 2-1 vote. The majority held that the statute is applicable to misstatements in reports filed with the SEC, even though such misconduct is also punishable under 15 U.S.C. 78ff. The court cited "settled law that 'when an action violates more than one criminal statute, the Government may prosecute either so long as it does not discriminate against any class of defendants.'" Pet. App. 25a; see *id.* at 33a (Lumbard, J., concurring in the judgment). The majority noted, in passing, that in the Second Circuit proof that a false statement was material is not required for a conviction under 18 U.S.C. 1001. Pet. App. 24a.[5]

Finally, the court rejected petitioner's contention that 18 U.S.C. 371 does not permit the government to charge a conspiracy to defraud the United States when the evidence would support a conviction for conspiring to violate a particular statute. Pet. App. 27a-29a. "Although it is recognized that the government may not obtain two convictions or punish the defendant twice for the same conduct by alleging violations of both the defraud and offense clauses of the conspiracy statute," the court explained, "it may

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that "[i]f petitioner had asserted good faith on direct examination, he could not use the attorney-client privilege to avoid cross-examination regarding the basis of that claim." Pet. App. 31a. In addition, he concluded that "[b]ecause [petitioner] decided not to testify on these matters, his claims are not properly preserved for appeal." *Ibid.*

[5] Judge Winter dissented from the majority's holding that the false statement statute applies to statements on reports required by the Securities Exchange Act of 1934. Pet. App. 35a-36a.

simultaneously prosecute the same conduct under both clauses." *Id.* at 29a.[6]

ARGUMENT

1. Petitioner argues (Pet. 8-15) that the district court erred in its rulings regarding the extent to which petitioner's proposed testimony on good faith would open the door to cross-examination regarding his communications with his attorney.

a. At the outset, as Judge Lumbard concluded (Pet. App. 31a), petitioner failed to preserve this contention for appellate review. In *Luce* v. *United States*, 469 U.S. 38 (1984), the trial court ruled on a motion *in limine* that if the defendant testified he could be impeached with a prior conviction. The defendant did not take the stand, and this Court held that the trial court's ruling *in limine* was not subject to appellate review. The Court explained that "[a] reviewing court is handicapped in any effort to rule on subtle evidentiary questions outside a factual context." *Id.* at 41. In particular, "[a]ny possible harm flowing from a district court's *in limine* ruling * * * is wholly speculative"; "[t]he ruling is subject to change when the case unfolds, particularly if the actual testimony differs from what was contained in the defendant's proffer"; "the

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[6] The court also rejected petitioner's challenges to certain evidence introduced at trial (Pet. App. 13a-18a); it found sufficient evidence to sustain a finding that misstatements on which the securities fraud convictions rested were material (*id.* at 18a-23a); it concluded that false statements on petitioner's Schedule 13D and 14D-1 filings were "within the jurisdiction" of the SEC (Pet. App. 26a-27a); it found that venue was proper (*id.* at 27a); and it rejected petitioner's challenge to the sufficiency of the evidence on the conspiracy counts (*id.* at 29a-30a). The petition does not seek further review of those rulings.

district judge is free, in the exercise of sound judicial discretion, to alter a previous *in limine* ruling"; and "[w]hen the defendant does not testify, the reviewing court also has no way of knowing" how the government would have proceeded. *Id.* at 41-42. In addition, the court noted, appellate review of *in limine* rulings would frustrate harmless error review, "result in the windfall of automatic reversal," and encourage defendants to make such motions "solely to 'plant' reversible error in the event of conviction." *Id.* at 42.[7]

The same reasoning forecloses review of the district court's rulings on petitioner's motions *in limine*. Indeed, in some respects, there is greater reason to be cautious in granting appellate review of *in limine* privilege claims than of the claims at issue in *Luce*. The extent to which a witness may waive a privilege and the resulting cross-examination are directly dependent upon the particulars of the witness's testimony. As the district court noted in this case, it is unreasonable to expect a district court to "sit down and structure a redirect examination question by question and then choreograph a recross-examination the same way." Tr. 2911. Further, whereas the trial and appellate courts were aware of the precise nature of the prior conviction at issue in *Luce*, the same is

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[7] The Court noted that those considerations are "particularly true" in the case of prior convictions, since the Federal Rules of Evidence require the court to weigh the probative value and prejudicial effect of such evidence. 469 U.S. at 41. But that observation does not suggest, as petitioner argues (Pet. 12), that those concerns are inapplicable to claims of the type at issue here. This case does not, of course, involve a question of "constitutional dimensions" such as the admissibility of testimony obtained under a grant of immunity. See 469 U.S. at 42-43.

not true of the privileged information that might be subject to disclosure based upon an *in limine* privilege ruling. For that reason and because the prosecutor has little opportunity to challenge a defendant's proffer regarding the testimony he may claim to have withheld in reaction to such a ruling, a privilege claim presents defendants with a greater opportunity to "plant" reversible error in the record and to distort appellate review by overstating the effect of an *in limine* privilege ruling on the evidence. See *Luce* v. *United States*, 469 U.S. at 42. As in *Luce*, the better course is to withhold review of the inherently fact-specific issues presented by privilege claims unless they have been played out at trial.

b. In any event, the court of appeals was correct in rejecting petitioner's claim on the merits. When a person testifies with respect to matters that might otherwise be privileged, his "credibility may be impeached and his testimony assailed like that of any other witness, and the breadth of his waiver is determined by the scope of relevant cross-examination." *Brown* v. *United States*, 356 U.S. 148, 154-155 (1958). See *United States* v. *Nobles*, 422 U.S. 225, 239-240 (1975); *McGautha* v. *California*, 402 U.S. 183, 215 (1971); *Harris* v. *New York*, 401 U.S. 222, 225 (1971); *Walder* v. *United States*, 347 U.S. 62 (1954); *Rogers* v. *United States*, 340 U.S. 367, 373 (1951); *Fitzpatrick* v. *United States*, 178 U.S. 304, 305 (1900). That principle is fully applicable to the attorney-client privilege.

Many cases recognize that a defendant is deemed to waive his attorney-client privilege by making an assertion whose fair and accurate resolution requires examination of otherwise confidential communica-

tions.[8] In this case, petitioner sought to testify that he believed it was lawful to represent in SEC filings that he had purchased Cluett and Hammermill shares with "personal funds," while at the same time limiting cross-examination into the basis for that belief and its possible inconsistency with advice he received from his attorneys. The district court was entirely correct in refusing to allow petitioner to have it both ways.[9]

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[8] *E.g.*, *United States* v. *Woodall*, 438 F.2d 1317, 1324 (5th Cir. 1970) (en banc), cert. denied, 403 U.S. 933 (1971); *Hearn* v. *Rhay*, 68 F.R.D. 574 (E.D. Wash. 1975). See *Sedco Int'l, S.A.* v. *Cory*, 683 F.2d 1201 (8th Cir.), cert. denied, 459 U.S. 1017 (1982); *Johnson* v. *United States*, 542 F.2d 941, 942 (5th Cir. 1976), cert. denied, 430 U.S. 934 (1977); S. Stone & R. Liebman, *Testimonial Privileges* § 1.50 (1983) (citing cases). Cf. *Hunt* v. *Blackburn*, 128 U.S. 464, 470-471 (1888).

[9] As the district court recognized, petitioner's testimony regarding his own state of mind would have opened several obvious lines of inquiry (Pet. 39a):

> If, for example, [petitioner] had been advised by counsel that he should not act as he did and [petitioner] proceeded to act contrary to this advice, the advice would have been relevant on the issue of [petitioner's] good faith. If [petitioner] had been advised by counsel that he should act as he did and [petitioner] followed this advice, the advice would likewise have been relevant on the issue of [petitioner's] good faith. If he had told counsel that he did not desire counsel's advice, this too would have been relevant on the issue of [petitioner's] good faith.

Even if counsel advised petitioner that his description of the Cluett and Hammermill transactions was lawful, the government would have been entitled to inquire whether petitioner had withheld facts relevant to that advice from his attorney. See Tr. 2408-2410 (prosecutor's description of appropriate lines of cross-examination).

The fact that petitioner disavowed an advice of counsel defense and indicated he would not refer expressly to attorney-client communications did not justify a different result. Petitioner proposed to testify to a state of mind that other evidence suggested was based upon (or inconsistent with) an attorney's advice.[10] An order allowing petitioner to make an unelaborated assertion of good faith without cross-examination into its basis and consistency with information available to him would have misled the jury. In light of evidence that petitioner had consulted with counsel regarding the Cluett and Hammermill transactions (see Pet. App. 39a), petitioner's proposed testimony could have left the jury with the impression that his asserted belief was consistent with what counsel had told him, or at least that counsel had not given him any pertinent legal advice.[11]

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[10] Waiver principles discussed in text are not reserved for cases in which a party has invoked an advice-of-counsel defense. *United States* v. *Woodall*, 438 F.2d at 1324 (defendant's assertion that he was ignorant of the consequences of a guilty plea waived attorney-client privilege on that subject); *Johnson* v. *United States*, 504 F.2d at 942 (same); *Sedco Int'l, S.A.* v. *Cory*, 683 F.2d at 1206 (assertion of fraud may waive privilege as to communications showing that party did not rely on allegedly fraudulent statements or that reliance was unreasonable); *Hearn* v. *Rhay*, 68 F.R.D. at 581 (assertion of the defense of official immunity waives privilege as to advice on requirements of the law); *Russell* v. *Curtin Matheson Scientific, Inc.*, 493 F. Supp. 456, 458 (S.D. Tex. 1980) (assertion of equitable tolling defense waived privilege as to whether party learned of deadline for filing from attorney). See S. Stone & R.S. Liebman, *supra*, at § 1.50.

[11] It is not disputed that petitioner's asserted good-faith belief in the legality of his actions involved advice of counsel. See Tr. 2343. The prosecutor would have had a substantial basis for inquiring into communications with counsel.

The district court put its finger on the incongruity of the course petitioner proposed (Tr. 2351):

> How did he acquire his belief? Did he go to Delphi and consult with the oracle? If he did, no problem. If, on the other hand, he talked to A and B and C, one of whom was an attorney who he consulted and who he paid, and the input that he received from that attorney went into his ultimate belief, I suggest that the matter is appropriate for cross-examination.

c. There is no conflict between the court of appeals' decision here and the decision in *United States* v. *White*, 887 F.2d 267 (D.C. Cir. 1989). In *White*, the D.C. Circuit reversed a ruling that a non-testifying defendant waived the attorney-client privilege merely by "putting the government to its proof on the issue of criminal intent." *Id.* at 270. In this case, as the court of appeals noted, the district court did not find a waiver on the basis of petitioner's not guilty plea or his argument that the government had failed to prove criminal intent beyond a reasonable doubt; the district court "did not prevent [petitioner] from denying criminal intent." Pet. App. 10a. Rather, "the district judge merely said that [petitioner's] own testimony as to his good faith would open the door to cross-examination, possibly including inquiry into otherwise privileged communications." *Ibid.* *White* did not involve any testimony of that kind, and the court of appeals here did not hold, contrary to *White*, that a waiver may be based on nothing more than a general denial of criminal intent.[12]

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[12] Needless to say, the Second Circuit does not limit a defendant's right to argue that the government has failed to prove criminal intent beyond a reasonable doubt, regardless of whether the defendant introduces any evidence. In sug-

d. Petitioner complains specifically (Pet. 13) about the district court's warning that testimony regarding the steps he took to restructure the Cleutt and Hammermill financing might expose him to cross-examination regarding the reasons he took those steps, including any role played by his attorneys' advice. In his view, the court of appeals failed to acknowledge that "[a] fact is one thing and a communication concerning that fact is an entirely different thing." *Upjohn* v. *United States*, 449 U.S. 383, 395-396 (1981).

The court of appeals recognized that distinction, but it also understood that under the circumstances of this case "the testimony about the changes would be inextricably intertwined with [petitioner's] assertion of good faith." Pet. App. 12a. In reaching that

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gesting otherwise (Pet. 10-11 & n.7), petitioner obfuscates the distinction between the denial inherent in a defendant's not guilty plea and affirmative testimony regarding state of mind. See, *e.g.*, *id.* at 10 ("A defendant who asserts that he did not act with criminal intent necessarily asserts that he acted in good faith."). The court of appeals' opinion is crystal clear on this point. See Pet. App. 10a.

The district court also recognized the distinction (Tr. 2346-2347):

> The subject of [petitioner's] good faith was relevant because good faith is a defense. The government has a burden and it doesn't shift to the defendant.
>
> If the defendant determines to take the subject up, he is talking about his good-faith belief that something was proper. One forms a belief by making inquiry, either talking with people or reading, getting information which you put into your head.
>
> * * * If part of the information was derived by [petitioner] talking with an attorney, it seems to me that his conversations with the attorney are appropriate, cannot be shielded by the privilege * * *.

conclusion, it relied upon petitioner's counsel's own explanation of the thrust of the contemplated testimony. Pet. App. 12a-13a. Petitioner was not entitled to a blanket ruling *in limine* that testimony on the steps he took to restructure the Cluett and Hammermill transactions would not open him to cross-examination.[13]

In the final analysis, this case presents only the question whether, on the particular facts of this case, it was an abuse of discretion for the district court to withhold a ruling *in limine* that would entitle petitioner to testify to his good faith without exposing himself to cross-examination regarding the basis for that belief and information inconsistent with it. That question does not warrant this Court's review.

2. Petitioner also seeks review (Pet. 15-18) of the question whether the false statement statute, 18 U.S.C. 1001, requires a showing of materiality.

Section 1001 may be violated in three ways; it imposes specified penalties upon any person who,

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[13] In fact, as we have noted, petitioner did testify regarding the structure of the transactions without being questioned about his communications with counsel. On direct examination, petitioner testified that he structured the Cluett deal to conceal DeBartolo's name, as well as the names of other investors, and to shield DeBartolo from lawsuits. On cross-examination, petitioner testified about the money that he raised from others to pay for his Cluett stock; he explained the profit-sharing agreements between himself and his investors (as well as his efforts to change those agreements into unsecured, interest-bearing loans); and he testified that he believed at the time of the Cluett transaction that profit-sharing agreements and secured loans needed to be disclosed on an SEC Schedule 13D, implying a belief that he was not obligated to disclose unsecured, interest-bearing loans. Gov't C.A. Br. 17-18.

> in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully [1] falsifies, conceals or covers up by any trick, scheme, or device a material fact, or [2] makes any false, fictitious or fraudulent statements or representations, or [3] makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry * * *.

Relying on the distinction between the language of the first clause (which refers to "a material fact") and the last two (which do not mention materiality), the Second Circuit has long held that materiality is not required for a conviction under the last two clauses. *E.g.*, *United States* v. *Silver*, 235 F.2d 375, 377, cert. denied, 352 U.S. 880 (1956); *United States* v. *Rinaldi*, 393 F.2d 97, 99-100 (1968); *United States* v. *Elkin*, 731 F.2d 1005, 1009, cert. denied, 469 U.S. 822 (1984). Other circuits, by contrast, have "inferred a judge-made limitation of materiality" for the false statement clause. *United States* v. *Corsino*, 812 F.2d 26, 30 (1st Cir. 1987). See cases cited at Pet. 17 n.22.

Although the circuits are in conflict on this question, the issue has no effect on this case. Each of the false statement counts charged that an SEC filing by petitioner violated both the "concealment" clause and the "false statement" clause of 18 U.S.C. 1001 in a particular respect. The district court determined —in findings not challenged on appeal—that each concealment charged was material. That finding amounted to a finding that the corresponding false statements were material as well, since the concealment and false statement charged in any given count were two sides of the same coin. For instance, one count charged that the Schedule 13D filing submitted

in connection with the Cluett transaction violated Section 1001 because petitioner "falsely claimed to have purchased * * * 581,000 shares of stock with 'personal funds'" and "unlawfully failed to disclose that he had purchased the stock with money raised from various individual investors, that he had profit-sharing agreements with his investors, and that he had guaranteed his investors against loss." C.A. App. C, ¶ 9; see *id.* ¶ 24. The district court found that the facts concealed were material for purposes of the "concealment clause"; having made that finding, the court could not logically have found that the false statement was any less material for purposes of the "false statement" clause. See *Kungys* v. *United States*, 485 U.S. 759, 770 (1988) (noting that the standard of materiality is the same in both contexts).[14]

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[14] As this Court recognized in *Kungys* v. *United States*, 485 U.S. at 772, the issue of materiality presents a question of law for the trial court, not an issue of fact for the jury. See *Sinclair* v. *United States*, 279 U.S. 263, 298 (1929); *United States* v. *Jones*, 933 F.2d 807, 811-812 (10th Cir. 1991); *United States* v. *Abadi*, 706 F.2d 178, 180 (6th Cir.), cert. denied, 464 U.S. 821 (1983). Even the Ninth Circuit, which had held prior to *Kungys* that materiality under Section 1001 is a jury question, *United States* v. *Valdez*, 594 F.2d 725, 729 (9th Cir. 1979), has recognized the contrary language in *Kungys*, see *United States* v. *Clark*, 918 F.2d 843, 846 (9th Cir. 1990). It may be prepared to join all the other circuits on this issue when an appropriate case presents itself. See *United States* v. *Daily*, 921 F.2d 994, 1004-1005 (10th Cir. 1990) (recognizing that *Kungys* requires conclusion that materiality is for the court, notwithstanding prior circuit precedent). Although the petition argues in passing that the Court should address this question in this case (Pet. 16-17 n.21), the issue is not encompassed by the questions presented (*id.* at i), and petitioner did not argue in the court of appeals that materiality was an issue for the jury.

Finally, the court of appeals rejected petitioner's contention that the evidence was insufficient to show that the misstatements and omissions in his SEC filings were immaterial for purposes of the fraud counts. Pet. App. 18a-23a. Although materiality for purposes of the anti-fraud provision is assessed from the point of view of the reasonable shareholder, see *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438, 450 (1976), rather than the government, as under Section 1001, see *Kungys* v. *United States*, 485 U.S. at 770, the distinction is inconsequential on the facts of this case. Thus, the failure of the district court to make an explicit finding of materiality with respect to the false statement clause of the Section 1001 counts could have had no effect whatever on the verdicts in this case.

3. Petitioner also contends (Pet. 18-21) that the general false statement statute, 18 U.S.C. 1001, does not apply to false SEC filings. In his view, he should have been prosecuted under Section 32(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78ff(a). See Pet. App. 60a.

By its terms, Section 1001 is fully applicable to false statements in SEC filings. Nothing in its language or legislative history supports an exemption for such statements. As the court of appeals noted, this Court "has long recognized that when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants." *United States* v. *Batchelder*, 442 U.S. 114, 123-124 (1979). In keeping with this principle, this Court held in *United States* v. *Gilliland*, 312 U.S. 86, 95-96 (1941), that Section 1001's predecessor was fully applicable to false affidavits that might also have been

subject to prosecution under the Hot Oil Act.[15] The courts of appeals have also consistently rejected contentions that Section 1001 is inapplicable to false statements that could be prosecuted under narrower provisions. *E.g.*, *United States* v. *Hartness*, 845 F.2d 158, 162-163 (8th Cir.), cert. denied, 488 U.S. 925 (1988); *United States* v. *Hansen*, 772 F.2d 940, 943-949 (D.C. Cir. 1985), cert. denied, 475 U.S. 1045 (1986); *United States* v. *Grotke*, 702 F.2d 49, 54 (2d Cir. 1983); *United States* v. *Anderez*, 661 F.2d 404, 407 (5th Cir. 1981); *United States* v. *Gordon*, 548 F.2d 743, 744 (8th Cir. 1977). There is no conflict among the courts of appeals on this issue or any other reason justifying this Court's review.

4. The federal conspiracy statute, 18 U.S.C. 371, prohibits conspiracies "either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose." Both of the conspiracy counts on which petitioner was convicted charged him with conspiring to commit specified offenses and to defraud the United States. C.A. App. C, ¶¶ 49, 57. Contending that those two clauses are mutually exclusive, petitioner maintains that it was improper to prosecute him for a conspiracy to defraud the United States when the evidence would have supported a conspiracy to violate a particular statute. Pet. 21-25.

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[15] Under regulations promulgated pursuant to that Act, the defendants were required to file affidavits regarding oil production. The statute made it a misdemeanor to "knowingly violat[e] any provision of [the] Act or any regulation promulgated thereunder." Act of Feb. 22, 1935, ch. 18, § 6, 49 Stat. 32. This Court held that the possibility of prosecution under that more specific statute did not foreclose application of the general prohibition against false statements found in the predecessor of Section 1001.

This Court has rejected petitioner's interpretation of Section 371. In *Dennis* v. *United States*, 384 U.S. 855, 862-864 (1966), the defendants were convicted of conspiring to defraud the United States by filing false affidavits with the National Labor Relations Board. They argued that the case involved "a conspiracy to commit the substantive offense of filing false statements in violation of 18 U.S.C. 1001" and that their misconduct "may not properly be laid under the conspiracy-to-defraud clause of § 371." *Id.* at 862-863. This Court held that "[t]he fact that the events [charged] include the filing of false statements does not, in and of itself, make the conspiracy-to-defraud clause of § 371 unavailable to the prosecution." *Id.* at 863-864. Recently, the Court reaffirmed that the defraud clause "reaches *any* conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of Government." *Tanner* v. *United States*, 483 U.S. 107, 128 (1987) (internal quotation marks omitted; emphasis added).

The fact that the two clauses in Section 371 are separated by the word "or" does not suggest that they are mutually exclusive.[16] There is no good reason, moreover, to attribute to Congress an intent to permit a defendant who has conspired to defraud the United States to avoid conviction by showing that the objects of the conspiracy also included one or more specific criminal offenses.

Nevertheless, in *United States* v. *Minarik*, 875 F.2d 1186 (1989), the Sixth Circuit reversed convictions under the defraud clause on the ground that the pros-

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[16] Under a statute that prohibited speeding "or" driving recklessly, the second clause could not fairly be read as limited to those reckless drivers who obey the speed limit.

ecution should have been brought under the offense clause. Although the court's opinion is wide-ranging and twice suggests categorically that the defraud clause and the offense clause are mutually exclusive, *id.* at 1187, 1194, the court's actual holding in *Minarik* was very narrow (*id.* at 1196):

> [W]here the duties of a citizen are as technical and difficult to discern as they are when a taxpayer, before levy, engages in otherwise legitimate activities that may make ultimate collection more difficult, we hold that a Congressional statute closely defining those duties takes a conspiracy to avoid them out of the defraud clause and places it in the offense clause. The conspiracy is still an indictable offense under the first clause of § 371. But compliance with our rule today will mean that prosecutors and courts are required to determine and acknowledge exactly what the alleged crime *is*.

In addition, the court placed great emphasis on confusion that it found in the government's theory of the case and identified a number of "limits of [its] holding." *Id.* at 1189-1190, 1195.[17]

In our view, *Minarik* was wrongly decided. It finds no support in the language of the statute; it conflicts with *Dennis* and *Tanner*; and its interpretation of the conspiracy statute is inadministrable in practice. But this case is not an appropriate one for the Court to address the correctness of *Minarik*. Petitioner's offenses do not fall within the scope of *Minarik*'s holding, since petitioner was not preju-

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[17] Both the court of appeals in the instant case and the Seventh Circuit have noted the limits on *Minarik*'s holding. Pet. App. 28a-29a; *United States* v. *Reynolds*, 919 F.2d 435, 439 (7th Cir. 1990), cert. denied, 111 S. Ct. 1402 (1991).

diced in his trial preparation or at trial by any confusion in the prosecution's theory of the case, and since there is no reason to characterize petitioner's offenses as "technical" or "difficult to discern." Moreover, petitioner would derive no benefit even from the broadest possible reading of that case.

The defendants in *Minarik* were charged only with conspiring to defraud the United States by engaging in conduct that arguably violated a single specific statute. By contrast, the indictment here alleged that petitioner was a member of broader conspiracies encompassing violations of numerous statutes and rules, as well as conduct (parking and accumulating shares) that is not in and of itself made criminal by any statute. Each count charged a conspiracy whose objects were both to commit specific offenses and to defraud the United States. If (as *Minarik* suggests) the two clauses are mutually exclusive, petitioner would have been entitled at most to an instruction that the jury should first consider whether his conspiracy violated the offense clause of Section 371 and should take up the defraud clause only if there was insufficient evidence to support a conviction of conspiring to commit a specific offense. Petitioner would not have been entitled to an acquittal, however, unless the jury found that he did not conspire either to commit a specific offense or to defraud the United States. The jury's guilty verdicts in this case establish that his conspiracy encompassed at least one of the objects forbidden by Section 371.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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